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September 13, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Mr. William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Ms. Tamara L. Preiss
Chief, Pricing Policy Division, Wireline Competition Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: BellSouth Multi-State Section 271 Application, WC Docket No. 02-150
Ex Parte

Dear Mr. Maher and Ms. Preiss:

On behalf of NuVox Communications, Inc. ("NuVox"), I am writing in response to BellSouth's September 12, 2002 *ex parte* in the above-referenced docket which introduces into the record a copy of the NuVox/BellSouth interconnection agreement and claims to identify "agreement provisions that are in dispute between the parties".¹ I also take this opportunity to underscore NuVox's position that what is before the Commission in this docket is BellSouth's

¹ Shortly before noon today, NuVox received a copy of BellSouth's lengthy September 13, 2002 *ex parte* ("Bush Letter"). To the extent that the Bush Letter covers the same ground as BellSouth's September 12 *ex parte* (filed by Kellogg, Huber et al.), NuVox will attempt to address it here. However, the bulk of NuVox's reply to the Bush Letter will come in the form of a responsive written *ex parte* to be filed on Monday, September 16, 2002. Given the Commission's time constraints, we will endeavor to make that filing both short and our last. We will file it with the Commission as early in the day on Monday, September 16, 2002 as possible.

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compliance with checklist item i and not merely a simple interconnection dispute, as BellSouth asserts.

As an initial matter, however, I doubt that the dispute identified by NuVox – checklist compliance with item i – or even the billing disputes identified by BellSouth with respect to the NuVox/BellSouth agreement, the Standard nine-state agreement or any other – could be resolved in a series of state-by-state complaints filed pursuant to the interconnection agreement. Surely, the minute NuVox or any other CLEC filed something at the state commissions, BellSouth would argue that NuVox would have to file separate tariff complaints before each of those commissions and yet another tariff complaint before the FCC. That would be 13 separate complaints for NuVox – and an untold number of other complaints for others.

As indicated in the BellSouth carrier notifications attached to the reply affidavit of Mr. Ruscilli and Ms. Cox, BellSouth's policy of applying non-cost-based rates to interconnection trunks and facilities via imposition of jurisdictional factors-based ratcheted interconnection billing purportedly applies to all CLECs. Must NuVox and other CLECs file multiple complaints to get out from under BellSouth's unlawful interconnection billing regime? Must NuVox and other CLECs file multiple arbitrations (and prevail) to avoid its incorporation into a new agreement?² How many appeals will there be? Will federal law be interpreted and applied differently in North and South Carolina, or in other states? Will certain CLECs have to compromise their rights by settling with BellSouth because they are unable to devote the resources to litigate and secure enforcement? Will other CLECs have to succumb to BellSouth's regime because they have insufficient resources to arbitrate?

These questions are troublesome and cast substantial doubt that BellSouth is now or will continue to be in compliance with its checklist obligations. Fortunately, there is a *relatively simple solution*. The Commission should make clear that BellSouth's jurisdictional factors-based ratcheted interconnection billing scheme is contrary to federal law and that it may not be unilaterally imposed on NuVox and others operating under the NuVox/BellSouth agreement or variants thereof. As demonstrated below, BellSouth's unlawful jurisdictional factors-based ratcheted interconnection billing scheme is *neither referenced nor incorporated* in nor applicable to the NuVox/BellSouth interconnection agreement. Under that agreement, NuVox is entitled to interconnection trunks and facilities at the TELRIC rates approved by the state commissions and incorporated therein.

With that said, NuVox must counter BellSouth's discussion of the NuVox/BellSouth interconnection agreement, because it is erroneous and, if left unchecked, it would result in the denial of cost-based access to interconnection trunks and facilities, as

² NuVox and BellSouth intend to begin negotiating a new interconnection agreement later this year.

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required by the checklist (incorporating sections 251(c)(2) and 252(d)(1)) the *Local Competition Order* and multiple FCC rules. In responding to BellSouth's September 11 *ex parte*, NuVox will attempt to keep its discussion concise and will not attempt to present an exhaustive review of all provisions of the NuVox/BellSouth interconnection agreement that are or could potentially be relevant.³

BellSouth cites to **General Terms and Conditions, Part B (Definitions), Definition of Local Interconnection** to lend support to its argument that somehow NuVox is not entitled to interconnection at TELRIC rates, to the extent that interconnection is used for anything other than "local traffic". However, the defined term "Local Interconnection" does not appear in the plain text of any of the operative provisions cited to by BellSouth. Although the term appears in the **title of Attachment 3, section 40 of the General Terms and Conditions, Part A** makes clear that "headings of Articles and Sections of this Agreement are for convenience and reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement." And, if there was any doubt, as NuVox has noted before, the **opening paragraph of Attachment 3** makes clear that interconnection is available for telephone exchange and exchange access traffic at the rates appended to the attachment (which are TELRIC rates for UNE transport). That section states:

The Parties shall provide interconnection with each other's networks for the transmission and routing of telephone exchange service (local) and exchange access (intraLATA toll and switched access) on the following terms[.]

Despite BellSouth's contentions to the contrary, it contains no reference to or limitation that might be implied by the defined term "Local Interconnection".

BellSouth asserts that **section 1.7 of Attachment 3** establishes bill and keep for "local interconnection". However, neither the word "local" nor the term "local interconnection" appears in the plain text of that section. Section 1.7 of Attachment 3 to the Agreement provides:

The Parties shall institute a bill and keep compensation plan under which neither Party will charge the other Party recurring and nonrecurring charges associated with trunks and facilities for the exchange of traffic other than Transit Traffic. Both Parties, as

³ For example, such a review would include a discussion of the provision of the agreement which states that it may only be amended or modified by written agreement (GT&C, Part A, Section 21.3).

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appropriate, shall be compensated for the ordering of trunks and facilities transporting Transit Traffic.

In short, this section provides for “bill and keep” for interconnection trunks and facilities used to exchange traffic other than Transit Traffic.⁴ The plain text of this section does not include or support the limitation suggested by BellSouth.

BellSouth also points to **section 2.3 of Attachment 3** which states that **if there is no rate in Exhibit A**, rates default to the “appropriate intrastate or interstate tariff for switched access services of the Parties”. However, this catch-all provision is not triggered because the rates are all there in Attachment A. Nothing is missing – the rates for trunk ports, dedicated transport (mileage and facilities termination), local channels and multiplexing are all included in attachment A.⁵ Thus, neither section 2.3 nor Attachment 3 support defaulting to tariffed rates for the interconnection trunks and facilities actually used by NuVox and BellSouth.

BellSouth also cites to **section 15 of the General Terms and Conditions, Part A, Resolution of Disputes and Attachment 7** (which is entitled “Billing and Billing Accuracy Certification” and not “Billing Disputes”, as BellSouth suggests). Although, NuVox has raised checklist compliance in this docket and has not filed a complaint under its interconnection agreement, it is certainly worth examining the plain text of section 15. That section plainly provides that “either Party may petition the Commission, the FCC or a court of law for resolution of the dispute” (emphasis added). Thus, BellSouth is wrong when it suggests that complaints under this interconnection agreement must be resolved by nine different state commissions.

Now, Attachment 7 does include provisions on billing disputes. Section 3 of Attachment 7 establishes that the parties will endeavor to resolve billing disputes within sixty calendar days. Although large volumes of disputes filed by NuVox with BellSouth have been languishing since last fall, modest progress has been made on that front in recent weeks.

In Mr. Bush’s letter of earlier today, he covers much of the same ground with no more success. For example, Mr. Bush asserts that the agreement “includes a provision for bill

⁴ Per the Agreement, transit trunks are purchased at the state commission approved TELRIC rates contained in Exhibit A to Attachment 3. Please note that the original Exhibit A has been superseded by rate amendments in most states. Those amendments are included in BellSouth’s filed version of the agreement after the original agreement.

⁵ See, e.g., North Carolina Rate Amendment, Attachment 3, Exhibit A. For states where, NuVox and BellSouth have not completed a new rate amendment, the rates are all there, too. However, in those states, the trunk port rate defaults to tariffed rates subject to true-up once TELRIC rates are established. See, e.g., Original Attachment 3, Exhibit A (which remains in effect for Alabama and Georgia).

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and keep on non-transit trunks and facilities for **local traffic**".⁶ However, as made clear above, the plain text of that provision, section 1.7 of Attachment 3, does not contain the word "local", the term "local traffic" or any limitation that might be implied by its inclusion.

NuVox is pleased that BellSouth finally admits that "NuVox is correct that its agreement does not specifically provide for the use of a PLF".⁷ However, NuVox emphatically disagrees with Mr. Bush's assertion that "the terms of the agreement (and the rates contained therein apply only to local traffic and facilities."⁸ The opening paragraph of Attachment 3 makes clear that no such limitation is included. Numerous other provisions also make this clear. The parties exchange many types and flavors of traffic under the agreement and across the interconnection trunks established pursuant thereto.⁹

With respect to a lack of any specific reference to a PLF or BellSouth's jurisdictional factors-based ratcheted billing scheme for interconnection trunks and facilities, Mr. Bush continues by stating that "[w]hile the factors are not detailed explicitly in the **Agreement**, they do represent the logical means by which the parties can implement the intent of the Agreement, namely the rates, terms and conditions of the agreement apply only to local interconnection." BellSouth apparently has overlooked more than the fact that neither section 1.7 nor the agreement as a whole are limited to the exchange of local traffic. Section 45 of the General Terms and Conditions, Part A provides:

This Agreement and its Attachments, incorporated herein by this reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and **neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.**

⁶ Bush Letter at 4 (emphasis added).

⁷ *Id.*

⁸ *Id.*

⁹ Although Mr. Bush attempts to distance the agreement's interconnection provision from UNEs, the rates contained in Exhibit A to Attachment 3 are the rates for UNE dedicated transport. Similarly, BellSouth's SGATs include rates for UNE dedicated transport that is to be used for interconnection trunks and facilities. BellSouth's SGAT, however, like its Standard nine state interconnection agreement, does seek to limit cost-based interconnection by making it available for only "local". See North Carolina SGAT (6/17/02) at I.E. ("Rates for interconnection for local traffic are set out in Attachment A.") (filed July 22, 2002 NCUC).

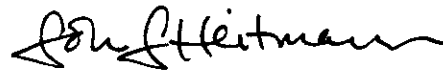
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This "entire agreement" provision plainly puts to rest Mr. Bush's assertion that BellSouth is somehow permitted to impose the jurisdictional factors-based ratcheted interconnection billing scheme that not only is not referenced in the agreement, but was not even established in BellSouth's web-posted Jurisdictional Factors Reporting Guide until more than a year **after** the parties executed the agreement. The intent of the agreement is demonstrated by its plain text. Consistent with BellSouth's obligations under the competitive checklist, there is no "local" limitation and there is no provision that allows BellSouth to impose its factors regime and, in so doing, to deny cost-based access to interconnection trunks and facilities.

If you have any questions about the foregoing, please do not hesitate to contact me at 202/955-9888.

Respectfully submitted,



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